IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Canada Easy Investment Store Corporation v. MacAskill,* 2024 BCSC 1381

Date: 20240730
Docket: S236505
Registry: New Westminster

Between:

Canada Easy Investments Store Corporation and Ralph Van Der Walle

Plaintiffs

And

Daryl MacAskill

Defendant

Before: The Honourable Justice Girn

Reasons for Judgment

Counsel for Plaintiffs:	S.K. Patro
The Defendant, appeared in person:	D. MacAskill
Place and Date of Hearing:	New Westminster, B.C. May 30, 2024
Place and Date of Judgment:	New Westminster, B.C. July 30, 2024

2024 BCSC 1381 (CanLII)

Table of Contents

IS THE COURT FUNCTUS OFFICIO? 5
IS EXPERT EVIDENCE REQUIRED? 7
DOCUMENTS NOT IN PARTY'S POSSESSION 9
CONCLUSION 10

2024 BCSC 1381 (CanLII)

2024 BCSC 1381 (CanLII)

[1] This application is one of many involving these parties who have been before this Court since March 2021. I will provide a brief history to provide context.

[2] Around September 2020, the defendant, Mr. MacAskill began making posts on the internet referring to the plaintiffs, Canada Easy Invest and Mr. Van Der Walle. The posts appeared on blogs created and controlled by the defendant. The title of the posts referred to Mr. Van Der Walle by name and purportedly reviewed his past business experience and current business activities using phrases like “dodgy real estate projects”, “scam real estate projects”, and “securities scams”.

[3] In March 2021, the plaintiffs filed a notice of civil claim alleging defamation and seeking general damages, special damages, aggravated damages, punitive damages, and a permanent injunction against the defendant. The plaintiffs also applied for an interim injunction.

[4] On March 26, 2021, Justice Block granted an interlocutory injunction prohibiting the defendant from publishing any accusatory or disparaging allegations regarding the honesty, trustworthiness, reputation, or alleged improper behaviour of the plaintiffs, their counsel, and their agents, in any forum whatsoever and also ordered the defendant to remove offensive posts from his blogs.

[5] The defendant initially complied with Justice Blok’s order. However, a short time later he continued to post derogatory comments about the plaintiffs on his blogs.

[6] On September 16, 2021, the plaintiffs filed an application to have the defendant in contempt of court for violating Justice Blok’s order and for an additional interim injunction prohibiting the defendant from contacting the plaintiffs’ business partners, investors and clients, effectively a no contact order. Justice Blok granted the additional interim injunction but adjourned the contempt hearing because the defendant did not attend the hearing.

[7] The plaintiff brought a summary trial application which came before Justice Riley. Once again, the defendant did not attend. Having found that the defendant

had been properly served, in written reasons, indexed as *Canada Easy Investment Store Corporation v. MacAskill*, 2022 BCSC 202, Justice Riley found that the plaintiffs had proven that the defendant committed the tort of defamation by publishing blog posts and by sending emails to third parties attaching links to the blog posts. Justice Riley also granted permanent injunctive relief given that the interim injunctions granted by Justice Blok had no effect on the defendant. I will provide more details of Justice Riley' reasons later on in these reasons.

2024 BCSC 1381 (CanLII)

[8] In regards to the contempt application, having heard the first stage of the contempt hearing, Justice Riley was satisfied that the defendant may be guilty of contempt by violating the terms of Justice Blok's order. Given that the defendant did not attend, the second stage of the contempt hearing was adjourned to allow the defendant to attend voluntarily before any warrant was ultimately issued.

[9] The defendant did attend at the second stage of the contempt hearing, which was heard by me on August 3, 2023. On August 15, 2023, I found the defendant guilty of contempt of court and sentenced him to imprisonment for fifteen days.

[10] At the contempt hearing, the defendant sought and was granted leave to bring on an additional application, which is now before me. I note that it has been adjourned a number of times.

[11] In this application, the defendant seeks orders compelling various telecommunications companies and email providers, that are not parties, to disclose customer name, address, and account information in relation to certain internet protocol ("IP") and email addresses. He also asks for orders that the plaintiff Mr. Van Der Walle refrain from using a particular email address and from creating or using any other email account using the defendant's name or any variation of it.

[12] Specifically, the defendant alleges that Mr. Van Der Walle used a Gmail account entitled grantmacaskill911@gmail.com and posted inflammatory posts in Google forums about the defendant. He also accuses Mr. Van Der Walle and his counsel, Mr. Patro of perjury and obstruction of justice.

[13] The defendant submits that in order for him to prove these allegations against Mr. Van Der Walle he requires the Court to compel customer account information from Telus Communications Inc., Shaw Communications Inc. and Alphabet Inc.

[14] The plaintiffs deny the allegations. Mr. Van Der Walle deposes that he nor anyone who is an employee of Canada Easy Investments Store Corporation under his supervision created, used or made any posts about the defendant on the Google community threads as alleged by the defendant.

[15] In their response to application, the plaintiffs oppose the orders sought related to Mr. Van Der Walle, and take no position with regard to the orders sought related to the telecommunications companies and email providers. Though, they say that the entire application must be dismissed for three reasons:

a) the doctrine of *functus officio* applies;

b) there is no evidence, including any expert evidence, to support the defendant's allegations about Mr. Van Der Walle, nor any evidence contradicting that of Mr. Van Der Walle; and

c) the defendant has failed to establish a legal basis for the orders sought in relation to Mr. Van Der Walle.

[16] With regard to the orders sought for production of documents from non-parties, there are issues with the defendant's compliance with the notice provisions of the relevant rules in the *Supreme Court Civil Rules*, B.C. Reg. 168/2009. However, I note that these nonconformities are immaterial given my other findings below.

<u>Is the Court Functus Officio?</u>

[17] The plaintiffs argue that this Court is *functus officio* because the defendant seeks interlocutory relief in an action that has already concluded. As I have noted above, Justice Riley granted the plaintiffs' summary trial application, finding the defendant liable for defamation. Riley J. explained the remedies for Mr. MacAskill's

2024 BCSC 1381 (CanLII)

defamation, being general, aggravated and punitive damages, as well as a permanent injunction restraining the defendant "from publishing any accusatory or disparaging allegations regarding the honesty, trustworthiness, reputation, or alleged improper behaviour of the plaintiffs, their counsel, and their agents … in any forum whatsoever": at para. 67. The plaintiffs note that a final order to that effect, made on February 2, 2022, has been entered.

[18] The doctrine of *functus officio* applies where a court has made a final order. With few exceptions, once a final order is entered, the court becomes *functus officio*: *Allart Estate v. Allart*, 2016 BCSC 768 at para. 43.

[19] In *Harrison v. Harrison*, 2007 BCCA 120, our Court of Appeal set out the following guidance on the matter:

> [29] Once an order has been entered, however, the court which made the order is *functus officio* with respect to the issues therein: *Piyaratana Unnanse et al v. Wahareke Sonuttara Unnanse et al*, 1950 CanLII 435 (UK JCPC), [1950] 2 W.W.R. 796 (P.C.). Once the judge is *functus*, the power to re-visit an order is much narrower. Generally speaking, that power is confined to making corrections or amendments in two situations: first, under Rule 41(24) of the *Supreme Court Rules* where there has been a 'slip' in drawing up the order or where a matter should have been but was not adjudicated upon; and second, where there has been an error in expressing the manifest intention of the court: *Buschau v. Rogers Communications Inc.*, 2004 BCCA 142; see also *Chandler v. Alberta Association of Architects*, 1989 CanLII 41 (SCC), [1989] 2 S.C.R. 848.

[20] In *Allart Estate*, the plaintiff had succeeded at summary trial with only the matter of costs to be addressed. The defendant then sought an order that the plaintiff produce various documents and that no further steps with regard to costs be taken prior to that disclosure. Justice Harris found that she had "no jurisdiction to entertain an application for what is essentially a pre-trial motion, given that this matter has concluded and the order entered": at para. 40.

[21] A finding of *functus officio* is not necessarily fatal to an application, as an entered order can be re-opened in certain circumstances: *Sherwood v. The Owners, Strata Plan VIS 1549*, 2018 BCSC 2105 at para. 23. However, those circumstances

2024 BCSC 1381 (CanLII)

are limited; for instance, to make corrections or amendments, or where the initial order did not express the manifest intention of the court: *Sherwood* at para. 25.

[22] The defendant relies on a number of affidavits and other documents which were in a USB flash drive appended to his most recent affidavit. I have spent a great deal of time reviewing these affidavits and documents. In these affidavits, the defendant continues to argue similar allegations of fraud, deception and perjury that he made before Justice Riley, which were ultimately dismissed.

[23] In this case, the defendant has not sought to re-open the summary trial. As well, it does not appear that the defendant seeks to correct an error in or amend Riley J.'s order, nor has he set out any basis to suggest that the initial order fails to express the court's manifest intention.

[24] I am satisfied that the defendant's application is essentially a pre-trial motion for document production. Accordingly, I have no jurisdiction to entertain this application as the matter has already concluded and the order entered.

[25] Although my conclusion that I have no jurisdiction ends the matter, I will nonetheless address the two other issues raised by the plaintiffs.

Is Expert Evidence Required?

[26] The plaintiffs say that much of the defendant's affidavit evidence is impermissible lay opinion, and that expert evidence would be required to establish any purported connection between the email address, posts, and Mr. Van Der Walle. They point to the topics on which the defendant gives affidavit evidence, which include among other things: the nature and substance of IP addresses; the ability to retrieve IP information in circumstances where posts are deleted; links between certain IP information to a domain host name that is connected to Mr. Van Der Walle; links between two IP addresses and servers connected to Shaw Communications Inc. and Telus Communications Inc.

2024 BCSC 1381 (CanLII)

[27] The general rule on opinion evidence, set out in *R. v. Mohan,* [1994] 2 S.C.R. 9, 1994 CanLII 80, is that: it must be relevant and necessary in assisting the trier of fact; it must not be inadmissible under any other exclusionary rule; and it must be offered by a properly qualified expert.

[28] There are certain limited exceptions to this rule, under which a lay person, with the permission of the judge, may give opinion evidence where it qualifies as a compendious statement of facts: *R. v. Jopowicz* (1992), 11 B.C.A.C. 42, 1992 CanLII 815. To be a compendious statement of fact, the opinion must be an inference or conclusion drawn from personal observation of the facts from which the inference is drawn, and one that an ordinary lay person is capable of drawing, based on common knowledge and experience: *American Creek Resources Ltd. v. Teuton Resources Corp.*, 2013 BCSC 1042 at paras. 14–16.

[29] There are certain matters on which courts have required expert evidence: see discussion in *Expert Evidence in British Columbia Civil Proceedings*, 6th ed. (Vancouver: CLEBC), s. 1.32. The plaintiffs submit that those categories are not closed, and that other matters—like those in the case at hand—may also require expert evidence. It should be noted that included in the defendant's affidavit evidence are, for instance, pages of computer code, from which the defendant claims he has based conclusions on his personal knowledge.

[30] The defendant has not provided any evidence suggesting that he is an expert qualified to provide technical evidence of this nature. However, he purports to give technical evidence on why he believes the plaintiff, Mr. Van Der Walle created the email account in question and posted the various comments on the Google community blogs.

[31] I am of the view that the defendant has in fact given evidence that is of a technical nature that almost necessarily requires an expert, as being beyond the typical experience and knowledge of an average person. In all of the circumstances, I am not satisfied that the defendant has established that he is an expert who is properly qualified to give this type of evidence.

2024 BCSC 1381 (CanLII)

2024 BCSC 1381 (CanLII)

Documents Not in Party's Possession

[32] In paragraphs 1–3 of the defendant's application, he seeks information from Telus Communications Inc., Shaw Communications Inc., and Alphabet Inc. These corporations are not parties to the litigation.

[33] The plaintiffs properly argue that this relief engages rules 7-1(18) and 8-1(7) of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009. Those rules are as follows:

> (18) If a document is in the possession or control of a person who is not a party of record, the court, on an application under Rule 8-1 brought on notice to the person and the parties of record, may make an order for one or both of the following:
>
> (a) production, inspection and copying of the document;
>
> (b) preparation of a certified copy that may be used instead of the original.
>
> …
>
> (7) The applicant must serve the following, in accordance with subrule (8), on each of the parties of record and on every other person, other than a party, who may be affected by the orders sought:
>
> (a) a copy of the filed notice of application;
>
> (b) a copy of each of the filed affidavits and documents, referred to in the notice of application under subrule (4) (d), that has not already been served on that person;
>
> (c) if the application is brought under Rule 9-7, any notice that the applicant is required to give under Rule 9-7 (9).

[34] Under Rule 7-1(18), the defendant was required to bring his application not only on notice to the parties, but also on notice to the persons alleged to be in possession of the document. In this case, that appears to be Telus Communications Inc., Shaw Communications Inc., and Alphabet Inc. The defendant has not complied with this Rule.

[35] Further, this Court has repeatedly noted that this rule (Rule 26(11) in the former *Supreme Court Rules*, B.C. Reg. 221/90) "could not be used for the mere purpose of obtaining discovery from a person not a party. To allow the Rule to be used in that way would be to permit a 'fishing expedition'": *Moukhine v. Collins*, 2010

BCSC 621 at para. 14, citing *Rhoades v. Occidental Life Insurance Co. of California*, [1973] B.C.J. No. 718 (B.C.C.A.).

Conclusion

[36] For the foregoing reasons, the defendant's application is dismissed. The plaintiffs are entitled to their costs of this application on the ordinary scale.

"Girn J."

2024 BCSC 1381 (CanLII)